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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JORGE MEJIA LOPEZ, Defendant and Appellant.	F075058 (Super. Ct. No. SF018381A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Jesse Whitten for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall, Catherine Chatman, and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jorge Mejia Lopez appeals after being convicted of committing several sex crimes against his minor stepdaughter. He alleges the trial court erred in refusing to admit evidence the child had previously claimed her grandfather had tried to sexually assault her; and that his counsel rendered ineffective assistance. We reject both claims and affirm the judgment. However, we will remand for the trial court to exercise its discretion under Senate Bill No. 1393 (Stats. 2018, ch. 1013).

BACKGROUND

In an information filed April 22, 2016, the Kern County District Attorney charged defendant with continuous sexual abuse of a child under the age of 14 (count 1; Pen. Code,[1] § 288.5, subd. (a)); lewd and lascivious act upon a child under the age of 14 (count 2; § 288, subd. (a)); penetration with a foreign object of a child under the age of 14 and more than 10 years younger than defendant (count 3; § 289, subd. (j)). As to each count, the information also alleged defendant had been previously convicted of shooting at an inhabited dwelling (§ 246), which constitutes a "strike" (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and a serious felony (§ 667, subd. (a)).

A jury convicted defendant on all three counts. After a subsequent court trial, the court found true the "strike" and serious felony allegations.

The court sentenced defendant to a total fixed term of 45 years in prison. The sentence was comprised of the following: on count 1, the upper term of 32 years plus five years for the serious felony enhancement; on count 2, a consecutive term of four years (one-third the midterm); and on count 3, another term of four years (one-third the midterm).

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1 All statutory references are to the Penal Code unless otherwise stated.

FACTS

A.C. was born in June 2004, and she was 12 years old when she testified at trial in November 2016.

Discovery of Abuse

A.C. testified that one of her teachers noticed "cut marks" on her arm. A.C. had been cutting herself because she "thought it would take away the pain." An assistant principal spoke with A.C. about the marks on October 28, 2015. A.C. wrote on a piece of paper and gave it to the assistant principal. A.C. had written, "I'm feeling hurt; because my dad touches me. And it makes me sad that I'm getting hurt by him. The last time he touched me was yesterday." A.C. was referring to defendant, her stepfather.

First Incident

A.C. testified that defendant first "touched" her when she was "like, eight or ten, somewhere around there." A.C. then narrowed it down to when she was, "[l]ike, eight." A.C. described the first incident. Before going to bed one night, she went to give defendant a goodnight kiss on the cheek. Defendant tried to kiss her on the lips and put his tongue in her mouth. A.C. pushed him off.

History of Abuse

A.C. lived in Wasco beginning when she was in first grade, until she moved to Shafter in fifth grade. While they lived in Wasco, defendant would "touch" her "maybe" three times per week. When asked what specifically defendant would do on those occasions, A.C. said sometimes he would put his penis in her vagina, other times he put his fingers "inside of me," and still other times he would "lick" her vagina. These types of incidents occurred about three times per week for the entire time between the first incident and when the family moved to Shafter. Sometimes, defendant would have her touch him; specifically, she would "shake his thing."

When they moved to Shafter, defendant would do the "same sorts of things" he had been doing to her at the Wasco house. However, the incidents increased to four

times per week from the time they moved to Shafter until October 2015 when A.C. spoke with the assistant principal.

Incident on October 27, 2015

One of the incidents occurred on October 27, 2015. Defendant pulled A.C. on top of himself, "suck[ed] [her] breast[s]," and began "shaking" his penis with his hand until "slimy stuff" came out. Defendant also put his fingers into her vagina. A.C.'s two brothers were home at the time. One was taking a shower and the other was playing video games in a bedroom.

Breast Swabs

On October 28, 2015, a sexual assault examiner took swabs from various places on A.C.'s body, including her left and right breasts.

Garett Sugimoto testified as the DNA technical lead criminalist at the Kern Regional Crime Laboratory. He testified that swabs from A.C.'s left and right breasts both tested positive for human saliva. The DNA profile from the left breast matched defendant. The DNA test for the saliva from the right breast swab was inconclusive with respect to defendant.

A.C.'s Contact with Prosecutor's Office Prior to Trial

At one point, the prosecutor asked A.C., "Did you, at some point, call my office and think about saying that this stuff didn't happen?" A.C. responded, "[y]es" and said she had considered recanting because she was concerned her sister would not have a dad and that money would be tight. However, she ultimately decided to tell the truth because she did not want defendant to sexually abuse her one-year-old sister.

Defense Case

Defendant denied having any physical contact with A.C. on October 27, 2015. Defendant had no explanation for why his saliva was found on A.C.'s left breast.

Defendant's wife testified. Child Protective Services required defendant to move out of the home. A.C. stopped cutting herself.

Testimony Concerning Defendant's Pubic Hair

Defendant and his wife both testified that he regularly shaves his pubic hair. In contrast, A.C. testified defendant had a lot of curly black pubic hair.

Child Sexual Abuse Accommodation Syndrome

Dr. Michael Musacco holds a Ph.D. in psychology. He testified for the prosecution about Child Sexual Abuse Accommodation Syndrome (CSAAS). The prosecutor did not provide Musacco with any information about the case and Musacco "specifically request[s] not to receive any information so that [his] testimony doesn't get tailored to fit the particulars of the case."

CSAAS has five stages. The first stage is "secrecy" because the child does not "have the wherewithal or the ability to have a normal protest." The second stage is "helplessness," which results from "the power differential between the perpetrator and the victim" and the fact that the child victims are not developmentally able to "do anything to pull themselves out of that situation." Most victims hold themselves responsible on some level, and their feelings of helplessness are exacerbated by shame and guilt. The third stage is "accom[m]odation" where "the child essentially copes with what's happening." Children cope in a variety of ways; some act out sexually, some become perfect students, some begin cutting or hurting themselves. The fourth stage is "delayed or unconvincing disclosure." Often, there is a triggering event like the perpetrator breaking up with the child's mother, or the child gets in trouble for something, which leads to the child disclosing the abuse "in pieces and bits." The child discloses in stages because they are "testing the water to see how that person is going to respond. They're already ashamed of it, confused, and embarrassed. They're not going to just disclose everything right away." The final stage is "retraction." This stage occurs "less commonly" and is not necessary for CSAAS to exist.

CSAAS does not apply to children making false reports. The fact that a child exhibits what appear to be the stages of CSAAS does not mean the child was actually abused.

DISCUSSION

Defendant contends the court erred in excluding certain evidence from trial. We describe that evidence below.

I. A.C.'s Prior Report her Grandfather Tried to Pull Her Shirt and Kiss Her

A. Background

The parties filed several motions in limine before trial. The prosecution's sixth motion in limine sought to preclude, under Evidence Code section 352, "any evidence relating to prior reports of sexual abuse made by the victim against her grandfather, [I.L.]."

In the motion, the prosecution stated:

> "In this case, the victim disclosed to officers that when she was eight, she was living with her grandmother and grandfather in Wasco (the defendant's parents). She told officers that at some point while she was living there, her grandfather, [I.L.], started kissing her on her shoulders and chest. She told her mother . . . what was happening with her grandfather. The victim said that her mother called her stepfather (the defendant). The defendant said he would discuss the situation with his father and tell him to stop. Her grandfather did stop until July 4, 2015. The victim knew that her grandfather had been drinking and she believed that he was drunk. She said that he tried to pull her shirt and kiss her on the shoulder. She walked away from him and nothing else happened since that time.
>
> "The People are unaware of whether [I.L.] has ever admitted or denied the allegations. To the People's knowledge, the officers never spoke to him about the allegations. The defense has not submitted any statement from [I.L.] addressing the allegations and no mention has been made to call him as a witness."

Before trial, the court and counsel discussed the motion in chambers before going on the record. The court said, "In the back, when we were in chambers, [defense counsel] said he thought it might – this evidence might be relevant to rebut if the Court

would allow the People to call the doctor and talk about the child abuse syndrome. This might rebut part of that syndrome's theory that the victims don't report abuse."

Defense counsel further explained:

> "I should have the right to introduce or bring up the fact that she had made . . . a prior report . . . of sexual abuse, which is different than going into what were the facts of that, whether it was true or not true. You know, I'm not going to try to prove it's false. I have no interest in that, at this point. But the fact that she did report is important. Because one of the, you know, supposed characteristics of a person who has suffered abuse or a child that has suffered abuse is they have failed to report or reluctant to report."

Defense counsel said, "I think I should be allowed to ask her – ask the victim: Didn't you report a previous sexual assault?"

The prosecutor said that neither he nor defense counsel were "in a position to litigate whether that prior abuse did or did not occur." The prosecutor stated he was concerned defense counsel would use the prior report "as evidence that she is someone who is prone to make reports . . . and again, we don't – the jury is not going to know whether or not the abuse by [I.L.] actually happened."

After this discussion, the court "table[d]" the prosecutor's motion in limine.

Several days later, the court and the parties resumed their discussion of the motion in limine. The court told defense counsel that the evidence A.C. previously reported misconduct by her grandfather was a "double-edged sword" because it could engender sympathy for A.C. Additionally, there "may be any number of reasons" to explain the apparent discrepancy between how A.C. reported I.L.'s misconduct but did not immediately report defendant's abuse. The court was also concerned with having "a trial within the trial about whether the whole thing was true."

Defense counsel noted that his plan "at this point" was to actually bring in the evidence through the testimony of A.C.'s mother.

The prosecutor reiterated his position that the evidence was substantially more prejudicial than probative because the jury could infer the victim was prone to making reports without any discussion of whether the reports were true or false.

The court ultimately ruled that there were "too many issues that could arise by letting that evidence [i.e., A.C.'s prior report] come in." However, the court noted that "if the door opens to that evidence in some other way, we'll readdress it."

The trial began later that day, on November 17, 2016.

After trial began (but outside the presence of the jury) defense counsel renewed "his request to ask about the victim's prior report concerning the grandfather." The prosecutor conceded that the issue did have some relevance to the case, but should still be excluded under Evidence Code section 352 because it was substantially more prejudicial than probative and risked confusion of the issues.

The court reaffirmed its prior ruling and excluded the evidence. Defendant argues the court erred in excluding the evidence.

B. Analysis

Trial courts have discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' " (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) For the reasons that follow, we conclude the court did not abuse its discretion.

The inference urged by defense counsel was, if A.C. had reported sexual assault once in the past, defense counsel could argue the CSAAS stages of "secrecy" and

"helplessness" did not apply here.[2] The probative value of the evidence was weak. As the trial court noted, there could have been other explanations for why A.C. quickly reported the misconduct by her grandfather but not defendant's abuse.

First, the abuse alleged against defendant was far more egregious – both in nature and frequency. A.C. claimed defendant sexually abused her three or four times per week. The sexual abuse included intercourse, oral sex and masturbation. In contrast, the alleged report about A.C.'s grandfather was that he kissed her on her shoulders and chest, and, on a different occasion, tried to pull her shirt and kiss her on the shoulder.

Second, the record showed little about the extent of A.C.'s relationship with her grandfather. One reasonable inference is that the pressure to keep abuse "secret" could be greater when the abuser is the child's father as opposed to the child's grandfather. While these considerations do not render the evidence of the prior report irrelevant, they weaken its probative value.

In contrast, the evidence posed a substantial risk of confusing the issues or misleading the jury. Because it was the defense who would have admitted the evidence (or asked the question eliciting the evidence), the jury could have assumed the prior

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[2] For this reason, we agree with defendant that *People v. Tidwell* (2008) 163 Cal.App.4th 1447, is largely distinguishable. There, defendant argued "the trial court abused its discretion by excluding evidence [the victim] made prior rape complaints that may have been false." (*Id.* at p. 1452.) The Court of Appeal upheld the trial court's exclusion of the prior complaints because it was "not readily apparent that those prior complaints were false" (*id*. at p. 1458) and therefore the evidence "was weak on the issue of [the victim's] credibility" (*id* at p. 1457). Here, defendant claims the prior reports are relevant for a different reason: they rebut the inference that A.C. may have been in stages 1 and/or 2 of CSAAS.

However, the *Tidwell* court was also concerned that litigating the truth or falsity of the prior rape claims would confuse the jury and consume time. That aspect of *Tidwell* has some bearing here. To avoid adverse credibility inferences, the prosecutor would have likely wanted to support A.C.'s prior allegation against her grandfather. This "trial within a trial" could have confused the issues and consumed an undue amount of time. (See *People v. Tidwell*, *supra*, 163 Cal.App.4th at p. 1458.)

report worked in defendant's favor. The most natural assumption the jury could have made was that the prior report must have been false or unsubstantiated or otherwise directly helpful to the defense. Of course, the defense's actual theory of admissibility was not that it showed A.C. had made prior *false or unsubstantiated* reports, but instead that it showed A.C. allegedly had the *ability* to make a report when sexually assaulted. But the fact that this evidence had such a nuanced relevance to defendant's case is also why it posed a "substantial danger . . . of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

We cannot say the trial court's ruling was arbitrary, capricious, or patently absurd. We find no abuse of discretion.

Defendant next raises an ineffective assistance of counsel claim.

II. Ineffective Assistance of Counsel

A. Background

At trial, defense counsel asked if A.C. recalled what time the sexual abuse incident occurred on October 27, 2015. A.C. responded, "Around maybe 9:00-ish." Defense counsel then asked if she recalled telling officers that it occurred around 6:00 or 6:30 p.m. A.C. said she did not recall telling the officers that.

Officer William Draucker testified at the preliminary hearing. Draucker first spoke with A.C. on the morning of October 28, 2015. A.C. told Draucker the sexual abuse incident the day prior had occurred at "about 6:30 p.m." Defense counsel did not call Draucker at trial.

Later in trial, defendant testified that on October 27, 2015, he took A.C. to the General Dollar store to buy chips and milk. The defense admitted into evidence a receipt from General Dollar dated October 27, 2015, and timestamped 18:44:22. Defendant said the General Dollar store was about an eight-minute drive from their home.

B. Analysis

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants. We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. [Citations.] A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703, italics omitted.)

The Attorney General argues counsel was not deficient in failing to call Draucker because Draucker's testimony about what A.C. had told him was inadmissible. The Attorney General notes that Evidence Code section 1235 only permits prior *inconsistent* statements, and A.C.'s claim that she did not *remember* telling officers the incident occurred at 6:30 p.m. does not show inconsistency. Defendant says the Attorney General misunderstands his position. The inconsistency is not between A.C.'s statement to Draucker and her testimony that she did not remember telling officers the incident occurred around 6:30 p.m. Instead, the inconsistency is between A.C.'s statement to Draucker and her testimony that the incident occurred around "9:00-ish."

We need not resolve this issue and decide whether counsel's performance was deficient because, even if it was, defendant cannot show prejudice. (See *People v. Holt, supra,* 15 Cal.4th at p. 703 [courts " ' " 'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies' " ' "].)

A defendant must show a "reasonable probability" that without counsel's errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984)

466 U.S. 668, 694.) There is not a reasonable probability the outcome would have been different if A.C.'s prior statement to Draucker had been admitted.

A.C. testified that on October 27, 2015, defendant pulled her on top of himself, "suck[ed] [her] breast[s]," put his fingers into her vagina, and began "shaking" his penis with his hand until "slimy stuff" came out. In contrast, defendant testified that he did not have any physical contact with A.C. whatsoever on October 27. These are two diametrically opposed versions of events. The jury's verdict clearly shows the jurors believed A.C. over defendant. We do not think it is reasonably probable the jury would have made the opposite credibility determinations merely because A.C. initially said the incident occurred "about 6:30 p.m." and over a year later put the time at "[a]round maybe 9:00-ish." A.C. was 11 years old when the incident occurred and 12 years old when she testified. She admitted when she did not remember details. And her testimony about when the incident occurred was indefinite – i.e., "*Around maybe* 9:00-*ish*" (italics added). It does not seem reasonably probable a jury would have concluded A.C. was lying about the sexual abuse merely because, a year later, she hesitantly identified a timeframe less than three hours different from what she initially told police. We reject defendant's claim.

III. Senate Bill No. 1393

"Prior to 2019, trial courts had no authority to strike a serious felony prior that is used to impose a five-year enhancement under section 667, subdivision (a)(1). Senate Bill [No.] 1393 removed this prohibition. (Stats. 2018, ch. 1013, §§ 1, 2.)" (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) This legislation applies to judgments that did not become final before January 1, 2019. (*Ibid*.)

A prior serious felony enhancement (§ 667, subd. (a)) was imposed in this case. As a result, we asked the parties to brief whether Senate Bill No. 1393 (Stats. 2018, ch. 1013) had any bearing on the present case. Defendant contends the matter should be remanded under Senate Bill No. 1393. The Attorney General concedes the amendments

implemented by Senate Bill No. 1393 apply retroactively to defendant's case. We accept the concession without further analysis, and turn to the Attorney General's claim remand is not appropriate because the trial court imposed the upper term on count 1, and denied the defendant's motion to strike his strike prior.

The trial court did deny defendant's *Romero*[3] motion. The court framed the issue as whether defendant fell outside the scope of the three strikes law pursuant to *People v. Williams* (1998) 17 Cal.4th 148. The court stated and considered factors for and against granting the motion then ultimately denied it finding defendant's circumstances to be within the spirit of the three strikes law. After denying defendant's request to strike the strike prior, the court rejected defendant's request for the midterm on count 1, and rejected defendant's request for a concurrent term on count 3. The court ultimately imposed the maximum possible sentence.

Defendant argues, however, the trial court did not "indicate that its goal was to give [defendant] as much time as possible" but, instead, analyzed each sentencing issue within its discretion independently using different criteria for each decision.

We agree with defendant; the trial court never articulated an intent regarding the ultimate sentence. Instead, it analyzed each discretionary decision presented to it with careful attention to the law that applied to each issue. It did so on the issue of bail after conviction, on defendant's motion to strike his prior conviction pursuant to *Romero*, on the issue of what term to impose on count 1, and on the issue of whether counts 2 and 3 should be run consecutively.[4] The factors considered as to each decision were specific to the particular issue addressed.

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[4] The court noted several factors regarding defendant during the course of these different issues: defendant had never failed to appear in court; defendant was a "productive member of society in terms of having a job, providing a roof and food for his family"; the potential punishment available was "pretty severe" even without the strike prior; the middle term was a possibility, but, defendant had numerous prior convictions;

If the trial court had, at the time of sentencing, the discretion to dismiss the prior serious felony enhancement, it appears from this record that it would have analyzed its decision independently from the other sentencing issues. The court did not indicate that it believed defendant's aggregate sentence was an appropriate fit for the crimes/circumstances and should not be reduced for any reason. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896-1897; see also *People v. Jones*, *supra*, 32 Cal.App.5th at p. 274 ["This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today."].) This is not to say we think the trial court will strike the prior serious felony enhancement on remand. To the contrary, it seems reasonably likely that the court will again decide to impose the prior serious felony enhancement. It is in this case, however, proper to remand the matter for the court to decide in the first instance whether to strike the prior serious felony enhancement.

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his prior performance on deferred entry of judgment, misdemeanor probation, and three grants of felony probation were unsatisfactory; the crimes committed were "very serious sex crimes"; the crimes began shortly after defendant had been paroled from prison; defendant took advantage of a position of trust as he was the victim's stepfather; defendant committed the crimes over a substantial period of time; defendant denied culpability for the crimes for which he was convicted; and his SARATSO score was "moderate/high." (SARATSO is the State-Authorized Assessment Tool for Sex Offenders meant to predict recidivism. (§ 290.04, subd. (a)(1), (2).))

DISPOSITION

The matter is remanded for the trial court to consider whether to strike defendant's prior serious felony enhancement under Penal Code section 667, subdivision (a), as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2). In all other respects, the judgment is affirmed.

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DETJEN, Acting P.J.

WE CONCUR:

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SNAUFFER, J.

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DESANTOS, J.